No. 84-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et. al.,*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

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August 17, 1984

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LIST REQUIRED BY RULE 28.1

Respondent MCI Telecommunications Corporation is wholly owned by MCI Communications Corporation. Other companies owned by MCI Communications Corporation are: American Television Relay, Inc.; British Western Union, Ltd.; Consolidated Communications Supply Company, Inc; MCI Airsignal, Inc.; MCI Airsignal Leasing, Inc.; MCI Airsignal of California, Inc.; MCI Airsignal of Colorado, Inc.; MCI Airsignal of Indiana, Inc.; MCI Airsignal of Nevada, Inc.; MCI Airsignal of Philadelphia, Pennsylvania, Inc.; MCI Airsignal of Pittsburgh, Pennsylvania, Inc.; MCI Airsignal of Virginia, Inc.; MCI Akron Cellular, Inc.; MCI Carolina Cellular, Inc.; MCI Cellular Systems, Inc.; MCI Cellular Telephone Company; MCI Charlotte Cellular, Inc.; MCI Cleveland Cellular, Inc; MCI Data Processing, Inc.; MCI Data Transfer Corporation; MCI Denver Cellular, Inc.; MCI Digital Information Services Corporation; MCI Equipment Corporation; MCI Galaxy III Transponder Leasing, Inc.; MCI International Telecommunications Corporation; MCI International, Inc.; MCI Kansas City Cellular, Inc.; MCI LA Cellular, Inc.; MCI LAX Corporation; MCI Leasing, Inc.; MCI Memphis Cellular, Inc.; MCI Message Network, Inc.; MCI Minnesota Cellular, Inc.; MCI Norfolk Cellular, Inc.; MCI Oklahoma Cellular, Inc.; MCI Philadelphia Cellular, Inc.; MCI Raleigh Cellular, Inc.; MCI Realty Corporation; MCI Services Corporation; MCI Sharing Services, Inc.; MCI Telecommunications Corporation; MCI Telecommunications Corporation of Virginia; MCI Transponder Leasing, Inc.; MCI Virginia Cellular, Inc.; MCI/TAS Corporation; N-Triple-C Inc.; Transatlantic Cable, Ltd.; WUI Dataprocessing Corporation; WUI Sales Corporation; WUI Service Corporation; WUI Specialized Communications, Inc.; Western Union International Caribbean, Inc.; Western Union International, G.M.B.H.; Western Union International, Inc.; Western Union International, S.A.; Western Union International, S.r.l.

STATEMENT OF THE CASE

The Federal Communications Commission ("FCC") decided how interstate telephone rates should be structured in order to recover costs which are subject to its jurisdiction. Its decision was affirmed by the D.C. Circuit. Neither the amount of these costs nor the FCC's jurisdiction over these costs is contested by the Petitioner, National Association of Regulatory Commissioners ("NARUC"). The subject of its petition is the interstate rate designed to recover the interstate costs of the local telephone company line which connects a residence or business to the local telephone company switch.[1] Such lines are used for both local exchange and intrastate long distance, and interstate long distance calling. Under a formula agreed to by a Joint Board of state PUC and FCC commissioners—a formula which is not at issue in this case—approximately one quarter (1/4) of the costs of such local lines have been allocated to the interstate jurisdiction for recovery through interstate rates.[2] The costs of these lines are non-traffic sensitive so that they remain exactly the same whether the telephone subscriber makes 1000 interstate and local calls a month or makes no calls whatsoever.[3] The Commission found that in order to be cost-based, the interstate rate for these lines, like their costs, should not vary with usage.[4] It found that the rate should be the responsibility of each subscriber because he has imposed the costs upon the network by ordering a line connecting his premises to the local telephone company switch.[5] Therefore, the Commis-

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[1]These costs include the costs of the line itself, as well as the costs of terminals and other customer premises equipment, the protection block and drop wire. *MTS and WATS Structure: Third Report and Order*, 93 FCC 2d 241, 269 (1983) *(Access Order)*.

[2]*NARUC v. FCC*, No. 83-1225, slip op. at 22 (D.C. Cir. June 12, 1984).

[3]*Id.*, slip op. at 19-20.

[4]*Id.*, slip op. at 29-30.

[5]*Id.*, slip op. at 29.

sion ordered that these non-traffic sensitive costs be recovered from the subscriber through flat rates,[6] rather than by usage-sensitive toll rates.[7]

The Commission's cost-based rate structure has the potential to liberate the nation's communications system from the previous exclusive reliance on artificially high usage-sensitive rates.[8] As non-traffic sensitive costs are recovered through flat rates, per minute rates for individual calls will decrease and usage of the nation's phone system will no longer be artificially repressed. Continued long-run reliance upon usage-based prices for the recovery of all non-traffic sensitive costs would artificially restrict calling patterns, distort economy-wide investment decisions, and even jeopardize the competitive position the U.S. now holds in the world marketplace.[9] The development of computer and related technologies could be inhibited.[10] The Commission's cost-

[6]A flat fee for multi-line business customers is currently in effect at a rate of approximately $6/line. Residential and single-line business customers are expected to be assessed a flat rate starting in mid-1985. The initial amount of the rate has not been set although the Commission has determined that it should not exceed $4/line through 1990. *NARUC v. FCC*, slip op. at 31-32.

[7]*Id.*, slip op. at 29-30. Other interstate costs would be recovered from subscribers through per minute rates. The per minute interstate rates are not the subject of the petition for certiorari. Under the FCC's plan, per minute rates would be assessed against telephone users in much the way they are now, so that rates for individual calls would be based on the duration of the call and the distance over which the call is transmitted. While all telephone subscribers will pay the flat interstate rate, some large volume subscribers and subscribers to interstate private lines will not pay a strict per minute rate but instead will be subject to specialized rate structures.

[8]*NARUC v. FCC*, slip op. at 29-30.

[9]*Access Order*, 93 FCC 2d at 275 (1983).

[10]*Id.* at 274, n.37.

based rate structure also has the potential to preserve the affordability of basic telephone service over the long term by preventing the defection of large telecommunications users from the local telephone network.[11] Without cost-based pricing, those large users have a strong economic incentive to "by-pass" the local telephone companies with facilities of their own. The remaining subscribers would then have to pay higher rates to replace the lost revenues previously provided by the large users.[12]

The Commission took a number of steps to ensure that its new combination of flat and usage-sensitive rates would not adversely affect the opportunity for universal telephone service in the short term. The Commission set up a universal service fund whereby interstate carriers would be obligated to bear a portion of the NTS costs so that the flat charge against the telephone user could be reduced in certain high cost areas.[13] The flat charge to the subscriber is to be phased in over time with a maximum "cap" of $4 for residential and single line customers until at least 1990.[14] The Commission staff was instructed to develop a monitoring program to detect any unanticipated effects of access charges upon subscriptions to telephone service, and the Commission promised to conduct a further proceeding before permitting residential rates in excess of $4 per month.[15] The Commission is conducting proceedings to devise a rule that would provide an exemption from the interstate flat charge for those

[11] *NARUC v. FCC*, slip op. at 29.

[12] *Id.* at 22 and 29.

[13] *Further Reconsideration Order* at para. 8, 55 RR 2d (P&F) 785, 789, 49 Fed. Reg. 7810, 7811 (1984).

[14] *Id.* at para. 20, 55 RR 2d at 791, 49 Fed. Reg. at 7812. *See also NARUC v. FCC*, slip op. at 32.

[15] *Further Reconsideration Order* at para. 9, 55 RR 2d (P&F) at 789, 49 Fed. Reg. at 7811.

persons (if any) who might have to disconnect if required to pay the flat charge.[16] The Commission is also examining waiver procedures for small telephone companies so that they could be exempt from the requirement of imposing full flat charges.[17]

SUMMARY OF ARGUMENT

NARUC seeks to turn a question of rate structure policy into a legal issue by asserting that the FCC and the court below have violated *Smith v. Illinois Bell,* 282 U.S. 133 (1930). But *Smith* dealt only with the issue of how costs should be separated between the jurisdictions. It did not address the issue of how the rates should be structured once that separation has taken place. Because NARUC here accepts the separations process and challenges only the Commission's rate structure, *Smith* is irrelevant to NARUC's concerns. The allegedly violated "mandate" of *Smith* with respect to intrajurisdictional rate structure simply does not exist. NARUC provides no reference to the place in *Smith* where such a "mandate" is articulated, and claims only that the "mandate" exists by virtue of Smith's "nature." It describes the so-called mandate in terms not used by the *Smith* Court and tries to base it upon fundamental misstatements of fact and economic theory.

Neither is there substance to NARUC's claim of an unlawful prescription by the FCC of an intrastate rate. The

[16] *Id.* at para. 18. 55 RR 2d (P&F) at 791. 49 Fed. Reg. at 7812.

[17] *Id.* at para. 24. 55 RR 2d (P&F) at 792. 49 Fed. Reg. at 7813. It is questionable whether all of these safeguards are necessary or proper. Nevertheless, it is apparent that the FCC has gone to great lenghts to accommodate the concerns about universal service voiced by parties such as NARUC.

rates prescribed by the FCC were interstate and were designed to recover interstate costs. They are charged to persons that have been provided interstate facilities. Moreover, a consistent line of cases, from which this Court has refused to grant *certiorari*, has held that the FCC has authority over facilities which are used for both intrastate and interstate communications.

ARGUMENT

I. THERE IS NOT EVEN A COLORABLE VIOLATION OF *SMITH v. ILLINOIS BELL*

There is no colorable basis for NARUC's claim of inconsistency between the decision of the D.C. Circuit and the decision of this Court in *Smith v. Illinois Bell*.[18] *Smith* is a jurisdictional separations case and not a rate structure case. *Smith* dealt only with the manner in which the costs of commonly used plant must be separated between the jurisdictions. It did not address how rates should be set to recover those costs once separation has taken place. NARUC does not claim that the costs of commonly used plant have been improperly separated and, indeed, accepts the costs allocated to the interstate jurisdiction as being in conformance with *Smith*. Having accepted those assumptions, NARUC has reached the boundaries of *Smith*. Its claim that

[18] 282 U.S. 133 (1930). In *Smith* the Court was faced with a claim that the intrastate telephone rates for coin box service in Chicago set by the state regulatory agency were unreasonably low. Following the *Minnesota Rate Cases, Simpson v. Shepard*, 230 U.S. 352 (1913), the Court found that jointly used telephone property must be separated between the two jurisdictions in order to assess the reasonableness of the state-imposed rates and to maintain the dual jurisdictional scheme established by Congress. There are two basic legal standards which the Court imposed on the separations process. First, the Court held that the separation of jointly used telephone property must be accomplished on a reasonable basis. While the Court recognized the "difficulty in making an exact apportionment," it nevertheless found that "reasonable measures" were "essential." 282 U.S. at 150. Second, the Court found that, in order to

the Commission's rate structure decision violates *Smith* is "exorbitant"[19] simply because it presumes a Supreme Court ruling which was never made on an issue which was never presented.

NARUC claims *Smith* imposes two requirements.[20] The first requirement—that there be an allocation of jointly used property between the jurisdictions—is supported in NARUC's petition with a quotation from *Smith* and an accompanying page citation.[21] NARUC does not claim that this require-

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maintain the statutory scheme enacted by Congress, the separations process must not be intended as, nor result in, a subsidy to either of the jurisdictions. The Court emphatically held that the separation of interstate and intrastate property "is essential to the appropriate recognition of the competent government authority in each field of regulation." 282 U.S. at 148. It follows that each jurisdiction must stand independently and may not rely on the ratepayers in the other jurisdiction for support. In applying this principle the Court stated:

> The [Illinois regulatory] commission would have had no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the company was too small and could be increased to make good the loss.

282 U.S. at 148-149. The Court thus declared that the Illinois Commission could not set confiscatorily low intrastate rates on the theory that Illinois Bell could then go to the Federal agency and get higher interstate rates to make up the revenue deficiency. Chief Justice Hughes later characterized his opinion in *Smith v. Illinois Bell*, as being predicated upon the existence of a situation "where the segregation of properties and business was essential in order to confine the exercise of state power to its own proper province." *Lone Star Gas Co. v. Texas*, 304 U.S. 224, 241 (1938). Not addressed by the Court in *Smith v. Illinois Bell* was the question whether jurisdictional separation must also be required to limit the authority of the Federal agency. *See Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945).

[19]Slip op. at 39.

[20]NARUC Petition at 11-12.

[21]*Id.*

ment has been violated. It is the second purported "requirement" of *Smith* on which NARUC's entire certiorari petition is premised. Yet, for this "requirement," NARUC furnishes no quotation from *Smith* and no citation to the page in *Smith* where the requirement is set forth. NARUC merely asserts that this requirement results from *Smith's* "nature":

> Second, *Smith by its nature* requires that the costs of the jointly-used local exchange property allocated to the interstate jurisdiction be recovered from within the interstate sphere, i.e., from interstate end users or interstate carriers.[22]

NARUC attempts to bolster its "nature" assertion with a footnote alleging that *Smith* "made it clear" that there exist two classes of telephone ratepayers and that interstate costs must be recovered from interstate end users instead of local exchange ratepayers.[23] NARUC fails to give any indication where the *Smith* Court "made clear" such a proposition.

The fact is that *Smith* never used the terms "interstate sphere," "interstate end users" or "local exchange ratepayers." This is because *Smith* was concerned only with the jurisdictional separation of costs—not who should pay those costs once divided. Nor does NARUC ever explain what those terms mean. Indeed, rather than being distinct classes, as asserted by NARUC, interstate and local subscribers are identical persons because subscription to telephone service automatically provides access to both local and interstate service.[24] It is not possible to subscribe just to local exchange service or just to interstate service. Nor, after subscription, is it possible to use one's phone exclusively for local use or exclusively for interstate use because the subscriber does not

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[22] *Id.* (emphasis supplied).

[23] *Id.* at n.18.

[24] *NARUC v. FCC*, slip op. at 40.

control the types of calls which he or she receives.[25] Thus, NARUC's assertion that there are two distinct classes of ratepayers is not only a misreading of *Smith*, but is fundamentally incorrect as a matter of fact.

NARUC does not quarrel with the FCC's authority to assess flat interstate charges against those persons who actually make interstate calls, or to assess flat interstate charges against those who actually receive interstate calls. It asserts that *Smith* is violated *only* when a flat interstate charge is assessed against those who neither make nor receive any interstate calls.[26] In such limited circumstances, NARUC claims that the charge is in reality an intrastate charge and violates *Smith's* "mandate" that interstate costs may only be recovered from those who actually use the interstate system.[27]

NARUC has not shown that its hypothetical class of subscribers, who neither make nor receive interstate calls, exists beyond a *de minimis* level or could even be identified. Even if a customer decided to make no interstate calls, even in emergencies, the customer could not prevent receipt of such calls. Nevertheless, assuming that the hypothetical situation on which all of NARUC's arguments are premised could occur, the local exchange user would receive no benefit under NARUC's reasoning. This is because, under NARUC's reasoning, interstate carriers and their customers should not be assessed any portion of the cost of that exclusively intrastate line—since they make, by the terms of the hypotheses, no use of the line whatsoever. With NARUC's reasoning, therefore, the only users who should be assessed

[25]Even if exclusive local use were possible, in practice it would be prohibitively complex and inefficient to set rates for individual subscribers on such a basis. Slip op. at 43, n.23.

[26]Slip op. at 42, citing Oral Argument Transcript.

[27]Petition for Certiorari at 14.

the cost of those hypothetical access lines used exclusively for intrastate calling would be the intrastate users themselves.[28] And if the exclusive intrastate users of those lines were required to pay a flat intrastate rate to recover the total cost of their lines, they would end up paying an intrastate rate virtually identical to the combined intrastate/interstate rate resulting from the FCC's plan.

NARUC's assertion that actual interstate use must be a precondition to assessment of an interstate rate also ignores fundamental economic fact. The flat charge reflects costs caused not by a subscriber's actually making or receiving local or interstate calls, but by the subscriber's common connection into the interstate and local network.[29] It is the act of subscribing to the network that imposes the line costs, not using the network. Interstate costs of the subscriber's connection which have been allocated to the interstate jurisdiction through the separations process are real and must be recovered regardless of how many or how few interstate calls a subscriber makes. If a person buys an automobile, his purchase price is the same irrespective to how much he happens to use the automobile. Only usage-sensitive costs such as fuel and maintenance are paid on a usage-sensitive basis. NARUC's only response to the court's and the Commission's reliance on this fundamental economic fact is that "NARUC does not agree with the D.C. Circuit's conclusion that a user incurs intrastate [sic] costs merely by being provided with access to the interstate system regardless

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[28] *NARUC v. FCC*, slip op. at 43.

[29] *Id.* at 29.

of whether he *ever* makes use of the system."[30] No citation to the record is provided, and NARUC makes no attempt to explain the factual or economic basis for its disagreement.

Finally, NARUC points to the legislative history of Section 410(c)[31] of the Communications Act as proof that the Commission's flat interstate charge violates the requirements of *Smith.*[32] But there is no indication in the legislative history cited by NARUC that flat interstate charges would violate *Smith*. The language quoted by NARUC states only what *Smith* held—that procedures for separating plant and expenses between the jurisdictions should be fair and equitable and not result in a subsidy to either jurisdiction. NARUC, however, is not contesting the fairness of the separations procedures by which cost were allocated to the interstate jurisdiction. Like *Smith,* Section 410(c) and its legislative history do not deal with the issue of how those costs should be recovered once they are separated fairly. NARUC finds significance in the statement by one legislator that separations should be accomplished "so that no unreasonable burden will be placed on either the interstate or intrastate users of telephone service."[33] Again, however, this language deals only with the separations process, which is not at issue in this case. Moreover, even if that language had relevance to the structure of interstate rates, the Commission's flat

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[30]Petition for Certiorari at 18, n.20 (existing emphasis). NARUC has misstated the court's conclusion. The subscriber does not "incur" costs because of his access to the telephone network. His act of subscription has caused costs and the separations process has allocated part of these costs to the interstate jurisdiction.

[31]Section 410(c) states:

> The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations. . . to a Federal - State Joint Board.

[32]Petition for Certiorari at 14-16.

[33]*Id.* at 15.

interstate charge imposes no undue burden on "intrastate users." "Intrastate users," if they exist, pay the flat interstate rate simply because they have ordered a facility which can be used for both intrastate and interstate calling, and the costs of that facility have in part been allocated to the interstate jurisdiction. They bear no undue burden by paying the costs of a facility which they have ordered.

II. THE APPLICATION OF ACCEPTED PRECEDENT BY THE D.C. CIRCUIT DOES NOT PRESENT AN IMPORTANT ISSUE OF LAW WHICH NEEDS TO BE SETTLED BY THE SUPREME COURT

Petitioner NARUC seeks to have this Court examine whether the D.C. Circuit properly interpreted Sections 2(b) and 221(b) of the Communications Act.[34] The court's application of precedent to these two sections does not raise an important issue of federal law. To the contrary, the court's ruling is consistent with a line of cases decided by the First, Second, Fourth and the Fifth Circuits, as well as its own prior decisions.[35] This Court has not granted certiorari in any of these cases.

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[34] *Id.* at 17.

[35] *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977); *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); *North Carolina Utilities v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) ("NCUC I"); *North Carolina Utilities Commission v. FCC*, 522 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) ("NCUC II"); *General Telephone Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971). *General Telephone Co. of Cal. v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969); and *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983) ("Computer II").

NARUC relies on Sections 2(b)[36] and 221(b).[37] It claims that the interstate flat rate "amounts" to an additional intrastate rate because local service is preconditioned upon payment of the rate.[38] According to NARUC, the charge therefore violates the Communications Act which reserves authority over intrastate rates to the states. The fundamental fallacy to this argument, of course, is that the FCC's flat rate is an interstate rate. It is designed to recover interstate costs, was prescribed as an interstate rate by the agency with interstate jurisdiction, and is charged to persons that have been provided interstate access through facilities whose costs have in part been allocated to the interstate jurisdiction. That the rate must be paid in conjunction with an intrastate rate in order to obtain access to the telephone network merely reflects the technical reality that a telephone subscriber is connected to both the local and interstate networks via the same line.

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[36]Section 2(b) of the Act, 47 U.S.C. Sec. 152(b), states that the Communications Act does not give the FCC jurisdiction over:

> charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

[37]Section 221(b) of the Act, 47 U.S.C. Sec. 221(b), provides that:

> [s]ubject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

[38]Petition for Certiorari at 14 and 17-18.

Because the Commission's flat charge is an interstate rate, there is no issue concerning the proper interpretation of the Communications Act, let alone an important issue worthy of Supreme Court consideration.[39] Moreover, even if an issue of federal law were present, the decision below showed that a consistent line of cases have ruled that the FCC has authority over facilities which are used for both intrastate and interstate communications.[40] In each of these cases, this Court has denied petitions for certiorari.[41]

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[39]In a brief in support of Petitioner NARUC, Respondent Department of Public Utility Control of the State of Connecticut ("Connecticut") attempts to raise an issue not presented in the Petition for Certiorari. It claims that the court's decision below was erroneous because it did not adequately review the FCC's order against what Connecticut chooses to refer to as the "universal service mandate" of the Communications Act. Conn. Br. at 7-8. In effect, Connecticut seeks to challenge the court's determination that, in general, the universal service question is not ripe for review because the Commission has not determined the size of the flat charge, the shape of transition or the class of persons affected. Slip op. at 52. As the court stated, when those determinations are made by the agency, interested parties below can seek review of the precise plans of the Commission. *Id.* Such a ripeness decision by the court is not an important issue of federal law that requires this Court's attention.

[40]Slip op. at 40-41.

[41]These cases have also uniformly narrowed the scope of Section 221(b) of the Communications Act to situations not presented by petitioner here. Petitioner's reliance on Section 221(b), without discussion of precedent which is directly adverse to its position, is remarkable. As stated by the court below:

> Section 221(b) is irrelevant to the problem before us; its limitation on Commission regulation of telephone exchange service "was merely intended to preserve state regulation of local exchanges that happen to overlap state lines." *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983).

Slip op. at 39, n.21.

CONCLUSION

For the reasons set forth above, MCI respectfully requests that NARUC's Petition for Certiorari be denied.

Respectfully submitted,

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